

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 RICHARD JAMES WELK,

11 Petitioner,

12 v.

13 MATTHEW CATE,

14 Respondent.
15

CASE NO. 12-CV-2943-IEG (WVG)

**ORDER DENYING WITHOUT
PREJUDICE CERTIFICATE OF
APPEALABILITY**

[Doc. No. 16]

16 Presently before the Court is Petitioner Richard James Welk’s (“Petitioner”)
17 application for certificate of appealability. [Doc. No. 16.]

18 On December 10, 2012, Petitioner, a state prisoner proceeding *pro se*, filed a
19 petition for writ of habeas corpus (“Petition”) pursuant to 28 U.S.C. § 2254
20 challenging his conviction for one count of first-degree murder. [Doc. No. 1,
21 Petition.] Petitioner contends that habeas relief is proper based on one ground: he
22 argues that his due process rights were violated based on insufficient evidence to
23 support his conviction for violation of California Penal Code § 187(a). [Id. at 9-19.]

24 On May 3, 2013, Magistrate Judge William V. Gallo issued a Report and
25 Recommendation (“R & R”) recommending that the Petition be denied with
26 prejudice. [Doc. No. 11, R & R.] On July 22, 2013, Petitioner filed an Objection to
27 R & R (“Objection”). [Doc. No. 14, Objection.] On July 22, 2013, Petitioner filed a
28 notice of appeal to the 9th Circuit, which stated the following: “Pursuant to Rule

1
4(a), Federal Rules of Appellate Procedure, Petitioner RICHARD JAMES WELK
2 hereby appeals from the Judgement of the Court denying the Petition for writ of
3 habeas corpus and dismissing the action with prejudice. Petitioner files this notice
4 *in anticipation of said judgement . . .*" [Doc. No. 15, Notice of Appeal (emphasis
5 added).] This Court has not yet ruled on the R & R. As Petitioner recognizes in his
6 Notice of Appeal, final judgment has not been entered in this case.

7 On August 15, 2013, the Ninth Circuit sent a letter to Petitioner which states
8 that "[a] briefing schedule will not be set until the district court and, if necessary,
9 this court determine whether a certificate of appealability should issue." [Doc. No.
10 18, Letter from 9th Circuit.]

11 A petitioner complaining of detention arising from state court proceedings
12 must obtain a certificate of appealability to file an appeal of the "final order" in a
13 federal habeas proceeding. 28 U.S.C. § 2253(c)(1)(A) (2007). Final orders are
14 subject to review on appeal. 28 U.S.C. § 2253(a); see also 28 U.S.C. § 1291 ("The
15 courts of appeals . . . have jurisdiction of appeals from all final decisions of the
16 district courts of the United States . . ."). "A decision is final within the meaning
17 of § 1291 if it (1) is a full adjudication of the issues, and (2) clearly evidences the
18 judge's intention that it be the court's final act in the matter." Patel v. Del Taco,
19 Inc., 446 F.3d 996, 1000 (9th Cir. 2006).

20 There has been no final, appealable order resolving the present action.
21 Accordingly, the Court **DENIES WITHOUT PREJUDICE** a certificate of
22 appealability. See 28 U.S.C. § 2253(c)(2); see also Macias v. Hartley, 2013 WL
23 2447870 (E.D. Cal. June 5, 2013); Terry v. Yates, 2006 WL 1170165 (E.D. Cal.
24 May 2, 2006).

25 **IT IS SO ORDERED.**

26 **DATED:** August 16, 2013


IRMA E. GONZALEZ
United States District Judge